

NOR AZLINA ABDUL AZIZ

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v.

AMINAH OMAR

HIGH COURT MALAYA, JOHOR BAHRU

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ABDUL MALIK ISHAK J

[CIVIL SUIT NO: 22-76-1994]

27 DECEMBER 1997

CIVIL PROCEDURE: *Pleadings - Whether parties bound - Amendment - Function of amendments - Whether may be made at any stage - Whether relevant if omission arose from negligence - Whether injury or injustice that cannot be compensated by costs caused to the other party - Rules of the High Court 1980, O. 20 r. 5*

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CIVIL PROCEDURE: *Specific performance - Agreement for sale of land - Land subject to restriction in interest - State authority refused approval for transfer - Specific performance, discretion of court - Whether undue hardship to the defendant - Specific Relief Act 1950, ss. 20 & 21*

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CONTRACT: *Non est factum - Burden of proof - Plea of illiteracy - Fraud - Whether fraud committed on defendant - Contracts Act 1950, s. 17(a) & (d)*

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The plaintiff and the defendant had entered into an agreement for the sale and purchase of a piece of land in Johor ('the agreement'). There was a restriction to the title of the land in that the prior approval of the state authority must be obtained before the title could pass to the plaintiff. The defendant had applied to the Pentadbir Tanah for approval to transfer the title of the land but the application was rejected. The defendant then returned the deposit to the plaintiff.

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The plaintiff subsequently appealed, without the knowledge of the defendant, to the relevant authority and approval for the transfer was given. The defendant, however, refused to proceed with the agreement. The plaintiff then claimed specific performance of the agreement and in lieu thereof damages.

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At the trial, the defendant raised the plea of *non est factum* for the first time arguing that she was illiterate and since the true contents of the agreement had not been read and explained to her, the agreement should be rescinded. The defendant also alleged fraud on the part of the plaintiff.

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a Held:

- b** [1] It is settled law that parties are bound by their pleadings. A case must be decided on issues raised by the pleadings which bind parties. If other issues are desired to be raised or come to light during the trial, they must be pleaded by way of amendment. In the instant case, by reason of the variance between the statement of defence and the evidence given by the defendant at the trial, an amendment has become necessary and should have been asked for at the conclusion of the defendant's case.
- c** [2] Order 20 r. 5 of the Rules of the High Court 1980 allows either party to alter or amend pleadings in such a manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties. This rule permits amendments at any stage and it is entirely irrelevant whether the original omission arose from negligence or carelessness. Such amendments are allowed under the rule when they occasion no injury and cause no injustice to the opposite party or for that matter where they can be sufficiently compensated by costs or other terms imposed by the court.
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- e** [3] There is a heavy burden of proof on the person who seeks to invoke the plea of *non est factum*. The essence of the plea is that the person signing believes that the document he signs has one character or one effect whereas in fact its character or effect is quite different. In the instant case, the burden of establishing a plea of *non est factum* fell on the defendant seeking to disown the agreement. There was no evidence to show that
- f** the defendant believed that she signed the agreement with one character in mind which turned out to be a different character entirely. She orchestrated the sale like a professional leaving her husband aside entirely and when the going got tough she was advised to feign "illiteracy". The defendant had failed to discharge that burden. There was clear and positive
- g** evidence that the plea of *non est factum* was absent from the factual matrix of the present case.
- h** [4] When the state authority first rejected the defendant's application for the transfer of the land to the plaintiff, the defendant had refunded the deposit and the agreement had become nugatory. There was no provision in the agreement for the plaintiff to appeal against that decision of the state authority. It was unreasonable for the plaintiff to appeal clandestinely without the knowledge of the defendant. It was unreasonable that the approval from the state authority which came some three years after the agreement should bind the defendant when the state authority had earlier
- i** rejected the application for the transfer of the land to the plaintiff.

- [5] By virtue of s. 21 of the Specific Relief Act 1950 ('the SRA') the court has a discretion to refuse specific performance where the granting of it will cause undue hardship. Under s. 20 of the SRA, where damages will provide an adequate remedy, the court will exercise its discretion not to decree specific performance. In the present case, there was a concluded contract when the parties signed the agreement but its performance was dependent on the approval of the state authority. Since the latter had rejected the application to transfer the land, specific performance could never be granted by this court. a
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- [6] The plaintiff also could not succeed in her alternative claim for damages. Damages must be measured according to the outlay expended in developing the land. The plaintiff did not expend a single cent to develop the land. The evidence showed that instead the defendant had expended money to build chalets on the land. c
- [7] The issue of fraud raised by the defendant in her statement of defence could not be sustained. The defendant was not induced by the plaintiff's misrepresentation to sign the agreement. The defendant had bargained with the plaintiff on the sale of the land. There was no fraudulent misrepresentation by the plaintiff within the meaning of s. 17(a) and (d) of the Contracts Act 1950. The defendant had failed to prove fraud beyond a reasonable doubt. d
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[Claim dismissed with costs.]

Cases referred to:

- Anjalai Ammal & Anor v. Abdul Kareem* [1969] 1 MLJ 22 (**refd**) f
- Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Ltd* [1995] 4 CLJ 283 (**fol**)
- Butler v. Fairclough* [1917] 23 CLR 78 (**refd**)
- Carlisle & Cumberland Banking Co v. Bragg* [1911] 1 KB 489 (**cit**)
- Chin Tai v. Siow Shiow & Ors* [1971] 1 MLJ 67 (**refd**)
- Clarapade v. Commercial Union Association* [1882] 32 WR. 262 (**refd**) g
- Cropper v. Smith* [1884] 26 Ch D 700 (**refd**)
- Denne v. Light* [1857] 8 DM & G 774 (**cit**)
- Eastern & Oriental Hotel [1951] Sdn Bhd v. Ellarius George Fernandez & Anor* [1989] 1 MLJ 35 (**cit**)
- Eng Mee Yong v. Letchumanan* [1979] 2 MLJ 212 (**refd**)
- Gallie v. Lee (sub nom Saunders v. Anglia Building Society)* [1977] AC 1004 (**refd**) h
- Hj Mohamed Dom v. Sakiman* [1956] 22 MLJ 45 (**refd**)
- KEP Mohamed Ali v. KEP Mohamed Ismail* [1981] 2 MLJ 10 (**refd**)
- Kiaw Aik Hang Co Ltd v. Tan Tien Choy* [1964] 30 MLJ 99 (**refd**)
- Kiong Man v. Kishen* [1971] 1 MLJ 54 (**refd**)
- Kok Kon Sang v. Siti Zaliha Mohd Noor & Anor* [1993] 1 CLJ 53 (**refd**) i

- a L Estrange v. F Graucob Ltd [1934] 2 KB 394 (refd)*
Letchemy Arumugan v. N Annamalay [1982] 2 MLJ 198 (refd)
Loi Hieng Chiong v. Kon Tek Shin [1983] 1 MLJ 31 (refd)
Nyap Kui Fah v. Len On Contractor [1978] 1 MLJ 208 (refd)
Pertab Chundar Ghose v. Mohendra Purkait [1888-1889] 16 IA 233 (refd)
Rainy v. Bravo LR 4 PC 287 (cit)
- b Sekemas Sdn Bhd v. Lian Seng Co Sdn Bhd [1989] 2 MLJ 155 (cit)*
Seow Teck Ming & Anor v. Tan Ah Yeo & Anor [1991] 2 MLJ 489 (cit)
Serangoon Garden Estate Ltd v. Marian Chye [1959] MLJ 113 (refd)
Siah v. Tengku Long [1964] MLJ 43 (refd)
Siti Aisha Ibrahim v. Goh Cheng Hwai [1982] 2 MLJ 124 (refd)
Subramaniam v. Retnam [1966] 1 MLJ 172 (refd)
- c Venkatachalam Chettiar v. Arunasalam Chettiar [1953] MLJ 234 (cit)*
Yeo Long Seng v. Lucky Park (Pte) Ltd [1971] 1 MLJ 20 (cit)

Legislation referred to:

- Contracts Act 1950, ss. 16(1), 17(a), (d), 47
National Land Code 1965, s. 322(2)
- d Rules of the High Court 1980, O. 20 r. 5*
Specific Relief Act 1950, ss. 20, 21(1)
- For the plaintiff - A Onn; M/s Onn & Partners*
For the defendant - Syed Nasaruddin Abdul Hadi; M/s Radzi & Abdullah
- e Reported by Ling Hea Hoon*

JUDGMENT

Abdul Malik Ishak J:

- f This case, like all the other cases, proceeded on the basis that the parties are bound by their pleadings. That is the settled law. The journals are replete with authorities on this point. Suffice for the present exercise that a few of them will be referred to. Thus, the Court of Appeal (Mathew CJ, Spenser Wilkinson and Hill JJ) in *Haji Mohamed Dom v. Sakiman* [1956] 22 MLJ 45 dutifully decided the case on the pleadings. Mathew CJ writing a separate judgment and with whom Spenser Wilkinson J agreed, observed:*
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- h* Nowhere in the pleadings is it alleged that the agreement was in the nature of a document of loan, and the case never proceeded on that basis. In my view, once he had found that the agreement for sale was a genuine document, the learned trial judge had no alternative but to order specific performance of the agreement or to award damages. I think it is clear that a Judge is bound to decide a case on the issues on the record and that if there are other questions they must be placed on the record, which in this case they were not, *Blay v. Pollard & Morris* [1930] 1 KB 628.
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In *Kiaw Aik Hang Co. Ltd v. Tan Tien Choy* [1964] 30 MLJ 99, Buttrose J writing for the Court of Appeal (with whom Wee Chong Jin CJ and Tan Ah Tah J agreed) observed at p. 101 of the report:

While one can appreciate the dilemma in which the learned trial Judge found himself as the result of his findings he has, with the greatest respect, in my opinion, decided the case on issues not raised by the pleadings and against the admissions contained in them and the evidence.

The case, in my view, must be decided on issues raised by the pleadings which bind parties. If other issues are desired to be raised or come to light during the trial they must be pleaded by way of amendment.

For these reasons alone, in my judgment, his decision cannot be allowed to stand and in the circumstances of this case I have come to the conclusion that in order to do justice between the parties a new trial must be ordered.

MacIntyre FJ writing for the then Federal Court (comprising of Barakbah LP, Azmi CJ (Malaya) and MacIntyre FJ) in *Anjalai Ammal & Anor v. Abdul Kareem* [1969] 1 MLJ 22 had this to say at p. 24 of the report:

The sole issue for trial was whether Khatijah had acquired an indefeasible title by adverse occupation before 30 May 1955. The reference by counsel to the *Trustees, Executors, and Agency Co Ltd* and *Templeton v. Short* was an unnecessary display of legal erudition which had the unfortunate effect of side-tracking the learned judge's mind into deciding the case upon an issue not properly before the court.

There is considerable authority in regard to the purpose and effect of particulars filed pursuant to O. 19, r. 7A of the Rules of the Supreme Court. At p. 31 of *Halsbury* (3rd edn) vol. 3, the learned commentator had this to say:

A party is bound by his pleadings unless he is allowed to amend them, and he is therefore bound by his particulars, which are, in effect, part of the pleadings under which they are delivered.

In *Thomson v. Birkley* [1883] 47 LTR p. 700 Watkin Williams J says:

The object of particulars is to prevent surprise, and to limit and particularise events in order that both parties should come to trial fully prepared for the issues.

In *Spedding v. Fitzpatrick* [1888] 38 Ch. D 410 at 413 Cotton LJ says:

The object of particulars is to enable the party asking for them to know what case he has to meet at the trial, and so to save unnecessary expense, and avoid allowing parties to be taken by surprise.

a In *Thorp v. Holdsworth* [1876] Ch. D 637 at 639 Jessel MR says:

The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules of order XIX was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to definite issues, and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.

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Finally, in *Yorkshire Provident Life Assurance Co. v. Gilbert & Rivington* [1895] 2 QB 114 at 152 Lindley LJ says:

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What is the effect of these particulars? I take it the effect of these particulars is this, that the issues to be tried are limited by these particulars in the first instance. I do not mean to say that leave cannot be obtained to add to the particulars – of course it can; but the moment these particulars are delivered, and until some further order is obtained for the delivery of further particulars, the effect of delivering the particulars is to cut down the matters in question in the action to the particulars.

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Therefore, in my opinion, the learned trial judge, in the instant case, had departed from the strict rules of procedure, in deciding the case on an issue not raised in the pleadings and on the assumption of a fact which the appellants were not obliged to call evidence to rebut.

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In *KEP Mohamed Ali v. KEP Mohamed Ismail* [1981] 2 MLJ 10 FC, Raja Azlan Shah (CJ Malaya) (as His Majesty then was) aptly remarked:

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As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground in which his evidence has been improperly excluded.

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In *Siti Aisha Binti Ibrahim v. Goh Cheng Hwai* [1982] 2 MLJ 124, 125 FC, Abdul Hamid FJ (who later rose to be the Lord President of the Supreme Court), in restoring the order of the learned President of the Sessions Court, spoke of the importance of pleadings in these words:

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On the other hand, counsel for the respondent argued that on the pleadings it was the appellant's case that at the time of the collision she was 'lawfully walking along the proper side of the road' whereas in her evidence she said she was walking across the road. It is the respondent's contention that the failure to abide by her pleadings was fatal and the appellant's claim must therefore be dismissed. The case of *Menah binti Sulong @ Minah binti Sulong*

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@ *Aminah binti Sulong v. Lim Soo & Anor (unreported)* is relied upon as authority that a decision should be in strict accordance with the pleadings. This is reflected in that part of the speech of Lord Radcliffe in *Esso Petroleum Co. Ltd v. Southport Corporation* [1956] 2 WLR 81, 91 when he said:

If an appellate court is to treat reliance as pedantry or mere formalism
I do not see what part they have to play in our trial system.

In another part of the same decision, particularly at p. 126 of the report, his Lordship Abdul Hamid FJ (who later rose to be the Lord President of the Supreme Court) continued in serious vein:

The case under consideration is simple and straightforward. Although the appellant pleaded in her statement of claim that she was 'lawfully walking along the proper side of the road,' in her evidence she clearly said that she was walking across the road. Moreover in her police report in the Agreed Bundle of Documents (Exh. P1) at the trial she stated that she was crossing the road. Indeed the defendant in his defence and his evidence stated that the plaintiff was crossing the road from left to right.

It is clear therefore that the defendant was not misled, prejudiced, embarrassed or in any way taken by surprise, or led astray by the plaintiff's pleading because from the very outset it was the contention of and the case for the defendant, that the plaintiff was walking across the road and not along the road.

With these principles in mind, I shall now proceed to narrate the facts.

This was a claim for specific performance by the plaintiff of an agreement for the sale of a piece of land in a Malay Reservation held under Lot 332, H.S (M) 110, Mukim of Penyabong, Tanjong Penyabong, in the State of Johor measuring 1.436 acres ('the land'). The agreed facts in exh. "C" clearly showed that:

- (1) the sale and purchase agreement of the land was dated 30 December 1990 and it was signed by both the plaintiff and the defendant;
- (2) there was a restriction to the title of the land in that there must be prior approval of the State Authority before title could pass to the plaintiff;
- (3) the defendant had applied to the Pentadbir Tanah Daerah Mersing for approval to transfer the title of the land;
- (4) that application was not approved by the Pejabat Tanah Johor;
- (5) the defendant admitted receiving a transfer form from the plaintiff's solicitor but the defendant refused to sign that form; and

- a* (6) the defendant admitted that there was a joint agreement to develop the land with a third party.

b The defendant in her statement of defence admitted that there was a sale and purchase agreement between the parties in regard to the land at the sale price of RM25,000. The land was, at the material time, registered in the defendant's name. It is still registered in the defendant's name. In her statement of defence, the defendant pleaded that she had not received RM2,500 as deposit but had instead received only RM2,300 from the plaintiff's husband by the name of Nasir bin Ismail ('SP6'). The defendant too pleaded in her statement of defence that SP6 agreed to pay the balance of RM200 and to give a copy of the agreement to the defendant but till to date the defendant had not received that agreement.

c At the trial proper, evidence was led and the defendant raised for the very first time and sought to impress upon the court that she was illiterate and since the true contents of the sale and purchase agreement had not been read and explained to her, that agreement should, consequently, be rescinded. In her testimony, the defendant testified to the following effect:

- d* (1) Saya tidak pandai membaca dan menulis. Saya tidak tahu samada grant ini (ditunjuk) adalah geran tanah saya (see p. 63 of the notes of proceedings).
- e* (2) Saya tidak tahu membaca dan saya beri kepada anak saya. (see p. 69 of the notes of proceedings).

f The defendant's son by the name of Ahmad bin Uthman @ Othman ('SD3') corroborated the defendant's version that she was illiterate. At p. 112 of the notes of proceedings, SD3 testified:

Memang saya tahu ibu saya tak boleh baca dan menulis.

g Of pertinence to note would be the failure of the defence counsel to lead evidence through the defendant in examination-in-chief (at pp. 63 to 73 of the notes of evidence) to the effect that the sale and purchase agreement was not read nor explained to her. However, to be fair to the defence there were oblique references by the defendant and SD3 that the sale and purchase agreement was not read nor explained in two instances. One was at p. 66 of the notes of proceedings where the defendant testified that:

h Saya ingat saya tandatangan kertas kosong sahaja.

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The other was at p. 110 of the notes of proceedings where SD3 testified:

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Memang saya tidak tahu butiran (P1) surat perjanjian ini sebab Nasir tidak beri kepada ibu saya dan (P1) diberi kepada ibu saya semasa ianya kosong sahaja.

In short, there was a concerted attempt by the defendant to challenge the very existence of the sale and purchase agreement ('agreement') for the sale of the land. The defendant was cross-examined and she testified at p. 74 of the notes of proceedings to this effect:

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Bila saya cop jari, suami saya dan anak saya ada di situ. Anak saya kata bolehlah cop jari kerana hendak jual. Itu sahaja lah. Pada masa itu saya tak tanya dan tak mintak apa pun.

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The defendant's son – SD3, under examination-in-chief, testified at p. 109 of the notes of proceedings:

Bila ibu saya hendak cap jari borang kosong, saya ada kata takkan lah ibu saya hendak tandatangan borang kosong.

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It is apparent from the excerpts of the evidence as reproduced that the defendant categorically stated that it was SD3 that had advised her to execute the agreement whereas SD3's evidence showed that he was suspicious that the agreement was to be executed in blank. It is also apparent from the evidence led by the defence raised at the trial was that blank papers had been executed which completely run foul of the averments in the statement of defence to the effect that there was in existence an agreement to sell the land and that agreement was in fact exh. P1.

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Naturally, the plaintiff through her learned counsel one Mr. A. Onn took exceptions and rightly argued that the defence submissions that there was a plea of *non est factum* and that the defendant had executed the agreement in P1 in blank had caught the plaintiff by surprise. It will be appreciated that the defence in the pleadings and in the cross-examination of the plaintiff and her witness led the plaintiff up the garden path, so to speak, to believe in the existence of the agreement. The defence had imprinted in the minds of the plaintiff that what was disputed was as to the terms and effects of the agreement as per exh. P1. There was no bar for the defendant to amend her statement of defence at any time so as to afford the plaintiff the opportunity of replying thereto by an amendment to the statement of claim. Order 20 r. 5 of the Rules of the High Court, 1980 ('RHC') allows either party to alter or amend the pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties. Order 20 r. 5 of the RHC permits amendments at any stage and it is entirely irrelevant

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- a* whether the original omission arose from negligence or carelessness. Such amendments are allowed under the rule when they occasion no injury and cause no injustice to the opposite party or for that matter where they can be sufficiently compensated by costs or other terms imposed by the court: *Seow Teck Ming & Anor v. Tan Ah Yeo & Anor* [1991] 2 MLJ 489. It must be
- b* remembered that the power given to the court to amend is entirely discretionary. That discretion has to be exercised judicially on proper consideration particularly of the special circumstances of the case. The court in *Clarapede v. Commercial Union Association* [1882] 32 WR 262 stated the law lucidly in these words:
- c* However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be done without injustice to the other side. There is no injustice if the other side can be compensated by costs.
- d* In *Cropper v. Smith* [1884] 26 Ch. D. 700, Bowen LJ observed:
- I have found in my experience that there is one panacea which heals every sore in litigation, and that is costs.
- e* In my judgment, where the amendment has become necessary, like the present case, by reason of the variance between the statement of defence and the evidence given at the trial, it should be asked for at the conclusion of the defendant's case. The converse actually happened in the case of *Rainy v. Bravo* LR 4 PC 287. In short, the defendant had failed, refused and/or neglected to amend their pleadings. Mr. Syed Nasaruddin bin Abdul Hadi, the learned counsel for the defendant, relied on the decision of the Federal Court in
- f* *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Ltd* [1995] 3 MLJ 331 to drive home the point that there was no necessity to plead *non est factum* and the allegation that the agreement was executed in blank. By way of an analogy, he sought to rely on *Boustead* as a parallel and submitted that there was a body of evidence introduced in the course of the
- g* trial to support the plea of *non est factum* and the allegation that the agreement was executed in blank and flowing from this he argued that this court was duty bound to consider them. Gopal Sri Ram JCA, delivering the judgment of the Federal Court in *Boustead* at p. 342 of the report succinctly said:
- h* ... where there is no pleaded case of estoppel, but there is let in, without any objection, a body of evidence to support the plea, and argument is directed upon the point, it is the bounden duty of a court to consider the evidence and the submissions and come to a decision on the issue. It is no answer in such circumstances, to say that the point was not pleaded: *Oversea-Chinese Banking Corp. Ltd v. Philip Wee Kee Puan* [1984] 2 MLJ 1.
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In another part of the same judgment at p. 342, his Lordship Gopal Sri Ram JCA continued:

It is to be emphasised that the categories of cases in which a court may permit an unpleaded point to be argued are not closed and that the foregoing three classes of cases are but mere illustrations of a much wider principle. It is this. A court may permit a litigant to argue that his opponent is estopped from raising a particular contention if it is in the interests of justice to do so. It is really a matter within the discretion of the particular judge who, when deciding where the justice of the case lies, must have due regard to all the circumstances of the case, including any injury or prejudice that may be caused by the affected party being taken by surprise. If a court comes to the conclusion that no injustice will be occasioned by permitting a party to raise estoppel as an issue, then, it may be justified in departing from the salutary rule contained in such decisions as *Haji Mohamed Dom v. Sakiman* [1956] MLJ 45 and *Anjalai Ammal & Anor v. Abdul Kareem* [1969] 1 MLJ 22 that imposes upon a judge the duty to strictly decide a case upon and only upon the issues raised in the pleadings and not upon an unpleaded case. Nevertheless, courts must ensure that the occasions upon which such a departure may be permitted are rare. For otherwise the rule which declares that a party is bound by its pleadings will be rendered meaningless.

Of course, Boustead binds me but here the learned counsel for the plaintiff objected by way of a submission that the defendant should not rest its case on an unpleaded issue. Boustead gives a discretion to this court to decide whether the unpleaded issues would occasion an injustice to the plaintiff and if there was injustice in the sense that an injury or prejudice may be caused to the plaintiff taken by surprise then it is not justifiable for this court to depart from the salutary rule that a party is bound by its pleadings. Mr. A. Onn, the learned counsel for the plaintiff, rightly submitted that the statement of defence reflected a line of defence that went diametrically opposite the plea of *non est factum*. It is to be recalled that the agreed facts in exh. 'C' in no uncertain terms showed that the parties agreed that there was an agreement to sell the land. The defence could have objected to the production of the agreement which was marked as exh. P1 and say that that was a false document. But alas nothing of that sort transpired. The agreement went in as an exhibit. The defence was also accorded another opportunity in the course of the trial to put to the plaintiff and SP6 to the effect that the agreement was not executed by the defendant. This was not done and as Mr. A. Onn put it, the plaintiff was greatly prejudiced by it.

Lest I be accused of an oversight, I will now consider Gopal Sri Ram JCA's approach in Boustead.

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- a* That this court was under a duty to consider evidence let in without objection to support the plea of *non est factum*.

An examination of the evidence showed that the defendant herself had said that after the agreement had been reached for the sale of the land, the defendant was invited to the land office to “buat kenyataan bagi jualan tadi”

b – a piece of evidence that can clearly be distilled at p. 65 of the notes of proceedings. The defendant knew what was in store for her. She played a major role and in her own words as seen at p. 65 of the notes of proceedings:

Persetujuan itu di buat oleh saya. Suami saya mendengar, saya yang cakap.

- c* Bila bersetuju itu dengan harga yang dicapai dia ajak pergi ke pejabat tanah bagi buat kenyataan bagi jualan tadi.

- The evidence thus far led indicated that the defendant knew of and agreed to the sale of the land in accordance with the terms of the agreement. The defendant knew that she was obliged under cl. 5 of the agreement to return the deposit once the land office rejected the application for transfer. At p. 70 of the notes of proceedings the defendant testified:
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Anak saya kata isi surat adalah perintah hendak jual tanah tidak boleh. Pejabat tanah punya gamak hendak cakap banyak tak mengerti.

- e* Dah kata (tidak) boleh jual macam mana. Kita pulang lah duit. Saya kata gitu kepada anak saya.

- These pieces of evidences did not support the plea of *non est factum*. Respect may be accorded to the defendant because of her age but her testimony clearly showed that she knew that exh. P1 was an agreement where she agreed to sell the land to the plaintiff. The defendant denied that she had discussed with her counsel in 1994 in regard to the present case. The defendant’s words were quite stern as seen at p. 77 of the notes of proceedings:
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- Lawyer saya tidak bincang dengan saya pada 1994 berkenaan kes ini. Tidak ada bincang. Saya sendiri sahaja.
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- Now, on 1 December 1994 the defendant affirmed an affidavit-in-reply as reflected in encl. 18 which was filed in court on 5 December 1994. Enclosure 18 was in reply to an affidavit affirmed by the plaintiff on 3 May 1994 which was filed on 28 May 1994 in encl. 8. Enclosure 8 was in support of the plaintiff’s summons-in-chambers in encl. 9 for summary judgment against the defendant. In encl. 18, paras. 3 and 6 thereof would cut the very foundation of the plea of *non est factum* as advanced by the defendant. Paragraph 3 of encl. 18 was worded in this way:
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Mengenai Para 2 Affidavit Nor Azlina bt Abd. Aziz saya mengaku bahawa pada 30hb December 1990 saya telah menandatangani Perjanjian Jual Beli dengan plaintif untuk menjual sebidang tanah saya yang dikenali sebagai H.S.(M) 110, Lot No: 332, Mukim Penyabong, Tanjong Penyabong (selepas ini dirujuk sebagai 'tanah tersebut') kepada Plaintiff pada harga belian RM25,000.00 sahaja tertakluk kepada kebenaran Pindahmilik bertulis daripada pihak berkuasa Negeri.

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Paragraph 6 of encl. 18 was couched in such a way as to indicate that the defendant really knew about exh. P1. It was worded thus:

Merujuk para 5 dan 6 Affidavit Nor Azlina bt Abd. Aziz, saya menyatakan bahawa menurut Perjanjian tersebut, saya telah membuat permohonan kepada Pejabat Tanah Mersing untuk memindahmilik tanah tersebut kepada nama plaintif tetapi permohonan itu tidak diluluskan oleh Pejabat Pengarah Tanah dan Galian Johor.

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In my judgment, even if I am minded to consider the plea of *non est factum* the body of evidence indicated that the defendant had agreed to and had affirmed the terms and conditions of the agreement as reflected in exh. P1. By the same token, paras 3 and 6 of encl. 18 clearly showed that the allegation that the defendant signed the agreement in blank was a lie and cannot be true.

d

Incidentally, the burden of establishing a plea of *non est factum* falls on the defendant seeking to disown the agreement and the defendant failed to discharge that burden. There was clear and positive evidence that the plea of *non est factum* was absent from the factual matrix of the present case. Lord Reid in *Gallie v. Lee (sub nom Saunders v. Anglia Building Society)* [1977] AC 1004 HL explained the plea of *non est factum* in this way:

e**f**

The plea of *non est factum* obviously applies when the person sought to be held liable did not in fact sign the document. But at least since the sixteenth century it has also been held to apply in certain cases so as to enable a person who in fact signed a document to say that it is not his deed. Obviously any such extension must be kept within narrow limits if it is not to shake the confidence of those who habitually and rightly rely on signatures when there is no obvious reason to doubt their validity. Originally this extension appears to have been made in favour of those who were unable to read owing to blindness or illiteracy and who therefore had to trust someone to tell them what they were signing. I think it must also apply in favour of those who are permanently or temporarily unable through no fault of their own to have without explanation any real understanding of the purport of a particular document, whether that be from defective education, illness or innate incapacity.

g**h****i**

- a** Lord Reid in the same case then spoke of the burden of proof on the person who sought to disown the agreement in these words:

- b** But that does not excuse them from taking such precautions as they reasonably can. The matter generally arises where an innocent third party has relied on a signed document in ignorance of the circumstances in which it was signed, and where he will suffer loss if the maker of the document is allowed to have it declared a nullity. So there must be a heavy burden of proof on the person who seeks to invoke this remedy. He must prove all the circumstances necessary to justify its being granted to him, and that necessarily involves his proving that he took all reasonable precautions in the circumstances. I do not say that the remedy can never be available to a man of full capacity. But that
- c** could only be in very exceptional circumstances; certainly not where his reason for not scrutinising the document before signing it was that he was too busy or too lazy. In general I do not think he can be heard to say that he signed in reliance on someone he trusted. But particularly when he was led to believe that the document which he signed was not one which affected his legal rights,
- d** there may be cases where this plea can properly be applied in favour of a man of full capacity.

Of crucial importance is Lord Reid's lucid exposition of the plea of *non est factum* in the same case in these short words:

- e** But the essence of the plea *non est factum* is that the person signing believed that the document he signed had one character or one effect whereas in fact its character or effect was quite different.

- f** The defendant knew that she signed the agreement in (P1) for the purpose of selling the land. She participated in the bargaining for the price of the land and she had her mind set to get the money. At p. 64 of the notes of proceedings, the defendant testified under examination-in-chief:

- g** Dia tanya kepada saya berapa saya letak harga. Pada mula nya saya letak harga sebanyak RM30,000. Dia kata kalau harga sebegitu dia tidak setuju, dia mintak kurang sedikit. Saya kata kalau hendak banyak saya tidak boleh bagi. Saya tanya berapa harga yang awak hendak.

Then at p. 68 of the notes of proceedings, under examination-in-chief, the defendant testified:

- h** Lepas itu dia balik. Itu sahaja. Lebih kurang sebulan atau dua bulan saya ada jumpa dia. Dia datang ke rumah dan dia kata kalau Ma'Cik hendak duit boleh mintak. Saya kata kalau saya dah jual saya hendak duit. Dia pun diam. Dia tidak bagi duit bila saya mintak duit.

i

There was no evidence to show that the defendant believed that she signed the agreement with one character in mind which turned out to be a different character entirely. She orchestrated the sale like a professional leaving her husband aside entirely. When the going gets tough she was advised to feign “illiteracy”. At p. 73 of the notes of proceedings there was a note in regard to the defendant’s demeanour. The note was worded: (“very alert mind”) in reference to the quick uptake of the defendant in answering questions.

a**b**

The Contracts Act 1950 makes no provision for the plea of *non est factum*. In *L. Estrange v. F. Graucob Ltd* [1934] 2 KB 394 the court there ruled that a party who signs an agreement is bound by the terms of the agreement. In *Serangoon Garden Estate Ltd v. Marian Chye* [1959] MLJ 113 the court held that, in the absence of fraud or misrepresentation, the party signing a document is said to be bound by it and that it was wholly immaterial whether the party had read the document or not. Again, in *Subramaniam v. Retnam* [1966] 1 MLJ 172 as usual the Malaysian court in blazing a trail held that even if the party could not read the language in which the document was written, that party was said to be bound by the contract. The defendant in *Kiong Man v. Kishen* [1971] 1 MLJ 54 raised the two popular defences of *non est factum* and fraud but the defendant failed to discharge the burden of proving them. Syed Agil Barakbah J (as he then was) delivering the judgment of the court in *Kiong Man v. Kushen (supra)* proceeded to examine the law on the issue of *non est factum* and this was what his Lordship said:

c**d****e**

The legal effect in a case of this nature is dealt with at great length by Lord Denning in the Court of Appeal of England in *Gallie v. Lee & Anor* [1969] 1 All ER 1062 where at p. 1066 he said:

f

The case thus raises the important question: What is the effect in law when a man signs a deed, or a contract, or other legal document without reading it; and afterwards it turns out to be an entirely different transaction from what he thought it was? He says that he was induced to sign the document by the fraud of another, or, at any rate, that he was under a fundamental mistake about it. So he comes to the court and claims that he is not bound by it.

g

In such a case, the legal effect is one of two: Either the deed is not his deed at all (*non est factum*); Or it is his deed, but it was induced by fraud or mistake (fraud or mistake).

h

His Lordship went on to explain the difference and continued thus:

i

- a* There is a great difference between the two. If the deed was not his deed at all, (*non est factum*) he is not bound by his signature any more than he is bound by a forgery. The document is a nullity just as if a rogue had forged his signature. No one can claim title under it, not even an innocent purchaser who bought on the faith of it, nor an innocent lender who lent his money on the faith of it. No matter that this innocent person acted in the utmost good faith, without notice of anything wrong, yet he takes nothing by the document.
- b* On the other hand, if the deed was his deed, but his signature was obtained from him by fraud or under the influence of mistake (fraud or mistake), the document is not a nullity at all. It is not void *ab initio*. It is only voidable; and in order to avoid it, the person who signed the document must avoid it before innocent persons have acquired title under it. If a person pays out money or lends money on the faith of it, not knowing of the fraud or mistake, he can rely on the document and enforce it against the maker. It avails the maker nothing, as against him, to say it was induced by fraud or mistake.
- c*

His Lordship Syed Agil Barakbah J (as he then was) proceeded to say in the same case:

- d*
- What is then the standard of evidence required of the defendant to discharge the burden of proof that is laid down by law of the plea of *non est factum*? I think the law requires strong and clear evidence for its discharge. The defendant has to prove that had he known the class and character of the document in question, he would not have signed it.
- e*

- In *Gallie v. Lee (sub nom Saunders v Anglia Building Society) (supra)* the House of Lords clearly stated that the plea of *non est factum* may not be raised as a defence by a party who had been guilty of negligence or had been careless in signing the document – thus over ruling the case of *Carlisle and Cumberland Banking Co. v. Bragg* [1911] 1 KB 489.
- f*

- In my judgment, the defendant having signed the agreement must be bound by it. It was irrelevant and immaterial if the defendant did not read the document in question. Even if the defendant could not read the language in which the agreement was drafted, she was still bound by it contractually. In my judgment, there was no strong and clear evidence to support the plea of *non est factum*. There was not an iota of evidence to show that the defendant did not know the intent and purport of the agreement when she thumbprinted it.
- g*

- h* Thus far everything is in favour of the plaintiff. That however is not the end of the matter.

- Having said and referred so much about that agreement, it is now opportune to reproduce that agreement in verbatim which was dated 30 December 1990 and marked as exh. P1. The agreement was worded thus:
- i*

DI NEGERI NEGERI SEMENANJUNG MALAYSIA SURAT PERJANJIAN

a

SURAT PERJANJIAN ini diperbuat di Bandar Mersing, Negeri Johor pada 30hb. Dis 1990 diantara dua pihak:-

JHDN/TPDS.MG/458/12/90

HASIL \$3.00

b

Pihak Pertama:

AMINAH BT OMAR @ MINAH BT OMAR

No/K.P: 1573457 (B)

Beralamat di Kampung Triang Besar,

86900 Endau, Johor.

...

PENJUAL

c

Dan

Pihak Kedua:

NOR AZLINA BT ABDUL AZIZ

No/K.P: 7064598 (B)

Beralamat di Kampung Triang Besar,

86900 Endau, Johor.

...

PEMBELI

d

BAHAWA Pihak Pertama - AMINAH BTE OMAR @ MINAH BT OMAR dengan akal fikiran yang sempurna tanpa digagahi oleh sesiapa mengaku MENJUALKAN Sebidang tanah, sepertimana butir-butir berikut ini:-

e

Tanah Mukim : Penyabong

Tempat : Tanjung Penyabong

No. HS(M) : 110

No. Lot : 332

Seluas : 1.436 ekar

f

kepada Pihak Kedua - NOR AZLINA BT ABDUL AZIZ dengan harga yang dipersetujui kedua-dua pihak sebanyak \$25,000.00 (Ringgit: DUA PULUH LIMA RIBU SAHAJA).

g

Syarat-Syarat Perjanjian:-

- 1). Bahawa Pihak Kedua - NOR AZLINA BT ABDUL AZIZ mengaku telah menjelaskan wang pendahuluan \$2,500.00 (Ringgit: DUA RIBU LIMA RATUS SAHAJA) di atas pembelian tanah tersebut di atas dengan Pihak Pertama - AMINAH BT OMAR @ MINAH BT OMAR pada hari dan tarikh perjanjian ini diperbuat.
- 2). Dan Pihak Kedua - NOR AZLINA BT ABDUL AZIZ mengaku menjelaskan bayaran baki hutang sebanyak \$22,500.00 (Ringgit: DUA PULUH DUA RIBU DAN LIMA RATUS SAHAJA) kepada Pihak

h

i

- a* Pertama, setelah Pihak Pertama - AMINAH BT OMAR @ MINAH BT OMAR mendapat kelulusan pindahmilik nama kepada nama pihak Kedua - NOR AZLINA BT ABDUL AZIZ.
- 3). Segala urusan yang berkaitan dengan pindahmilik nama, stem, pendaftaran penilaian dan sebagainya adalah menjadi tanggungan Pihak Kedua - NOR AZLINA BT ABDUL AZIZ.
- b* 4). Jika sekiranya berlaku perkara-perkara yang tidak diingini kepada mana-mana pihak (Pihak Pertama & Pihak Kedua) maka waris-warisan terdekat kedua-dua belah pihak berhak untuk meneruskan segala perjanjian mengikut yang tercatat di dalam SURAT PERJANJIAN INI.
- c* 5). Sekiranya Pihak Pertama - AMINAH BT OMAR @ MINAH BT OMAR tidak mendapat kelulusan Kerajaan untuk dipindahmilik nama kepada nama Pihak Kedua - NOR AZLINA BT ABDUL AZIZ, maka Pihak Pertama berhak untuk memulangkan kembali wang pendahuluan sebanyak \$2,500.00 (Ringgit: DUA RIBU LIMA RATUS SAHAJA) tanpa feadah kepada Pihak Kedua - NOR AZLINA BT ABDUL AZIZ.
- d* 6). Mulai dari tarikh ini maka Pihak Kedua - NOR AZLINA BT ABDUL AZIZ berhak dan berkuasa sepenuhnya di atas tanah tersebut itu dan Pihak Pertama - AMINAH BT OMAR @ MINAH BT OMAR serta waris-warisan terdekatnya tidak berhak dan berkuasa lagi untuk membuat tuntutan di atas tanah tersebut itu dari masa kesemasa dengan Pihak Kedua - NOR AZLINA BT ABDUL AZIZ.
- e*

Kedua-dua pihak telah bersetuju pada syarat-syarat yang ditetapkan dan menurunkan tandatangan masing-masing dihadapan saksi yang hadir.

- | | | |
|----------|--|--|
| <i>f</i> | Tandatangan
Pihak Pertama: | Tandatangan
Pihak Kedua: |
| | PENJUAL, | PEMBELI, |
| | Thumbprint | Sgd (Illegible) |
| <i>g</i> | ... | ... |
| | (AMINAH BT OMAR @
MINAH BT OMAR)
No/K.P: 1573457 (B) | (NOR AZLINA BT ABDUL AZIZ)

No/K.P: 7064598(B) |
| <i>h</i> | Sgd (Illegible) | Thumbprint |
| | ... | ... |

i

(NASIR BIN ISMAIL)
No/K.P:4911825 (B)

(ABD.RAHMAN BIN SALLEH)
No/K.P:1573456 (B)

a

Clause 3 of the agreement empowers the plaintiff to do the needful to transfer the land to her name.

b

Clause 5 of the agreement states that if the government does not approve the transfer of the land to the plaintiff, then the defendant is to refund the deposit of RM2,500 without any interest to the plaintiff.

It was the defendant's stand that she merely received a deposit of RM2,300 and not RM2,500 as alleged and set out in clause 1 of the agreement. The balance of RM200 though promised by SP6 did not materialise at all. Even a copy of the agreement was not transmitted to the defendant by SP6. All these were sufficiently pleaded in paras 3(a), 3(b) and 3(c) of the statement of defence. Clause 2 of the agreement states that the plaintiff needs to pay the balance of the purchase price to the defendant only after the defendant obtains the approval of the state authority for the transfer of the land. No time frame was mentioned in cl. 2 of the agreement. It was unclear and uncertain as to when and how much time was needed for the defendant to undertake the process for the transfer of the land to the plaintiff. Clause 2 must be read with cl. 3 and when so read the duty and responsibility of obtaining the approval of the state authority for the transfer of the land rested entirely with the plaintiff. The crucial question to ask would be this: Was there a reasonable time frame envisaged in the agreement for the balance of the purchase price to be paid to the defendant? Section 47 of the Contracts Act 1950 enacts that:

c

d

e

Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

f

Explanation – The question 'what is a time' is, in each particular case, a question of fact.

g

In *Nyap Kui Fah v. Len On Contractor* [1978] 1 MLJ 208, the then Federal Court held the view that where no time was set for the performance of the contract, the law implied that performance must be completed within a reasonable time having regard to the circumstances. What were the circumstances in the present case? The plaintiff set about her task to transfer the land to her and by 5 December 1991 the result was depressing. The state authority did not approve the transfer of the land to the plaintiff and in a short letter marked as exh. (P2), the rejection was worded thus:

h

i

- a** PEJABAT PENGARAH TANAH DAN GALIAN
JOHOR,
PETI SURAT 718,
80000 JOHOR BAHRU NO. TEL: 243366/69

- b** Ruj. Kami: (2)dlm.PTG(D)PM/
MG/91-34

Tarikh: 5hb Disember, 1991
- c** Puan Aminah bt. Omar @ Minah bt. Omar,
Kampung Triang Besar,
86900 Endau,
Mersing.
- d** PERMOHONAN KEBENARAN MEMINDAHMILIK TANAH
HS (M) 110 LOT 332 Mk. Penyabong

Adalah dimaklumkan bahawa Kerajaan TIDAK BERSETUJU akan permohonan
tuan/puan untuk memindahmilik tanah tersebut di atas kepada Nor Azlina bt.
Abdul Aziz.
- e** Sekian dimaklumkan. Terima kasih.

“BERKHIDMAT UNTUK NEGARA”

Sgd (Illegible)
(JAMA BIN JOHAN)
b/p Pengarah Tanah dan Galian
- f** Johor.

s.k. Pentadbir Tanah Daerah
Mersing - PTD(MG)10/PM/126/90

- g** Puan Nor Azlina bt. Abdul Aziz,
Kampung Triang Besar,
86900 Endau,
Mersing.
- h** The defendant understood the tenor of the rejection letter in exh. P2 and she
wasted no time to exercise her right under cl. 5 of the agreement. The deposit
of RM2,300 was duly returned to the plaintiff through Ismail bin Ahmad (SP2
– the plaintiff’s father in law) as reflected in exh. D7 dated 30 April 1992
which is now reproduced hereinunder:
- i**

AKUAN SERAHAN WANG

Nama Penyerah : AMINAH BTE OMAR
No. K/P. 1573457

Nama Penerima : ISMAIL BIN AHMAD
No. K/P. 2332239

Tarikh : 30.4.92

Saya Aminah bte Omar No. Kad Pengenalan 1573457 dengan ini menyerahkan wang kepunyaan Encik Nasir bin Ismail sebanyak \$2,300.00 (Ringgit: Dua Ribu Tiga Ratus Sahaja) kepada bapanya Encik Ismail bin Ahmad No. Kad Pengenalan 2332239 iaitu wang cengkeram pembelian tanah yang tidak diluluskan oleh Pejabat Tanah Johor Bahru melalui suratnya bertarikh 5.12.91.

Sekian dimaklumkan. Terima kasih.

Tandatangan Penyerah : ...
Sgd (Illegible)
(AMINAH BTE OMAR)
No. K/P. 1573457

Tandatangan Penerima : ...
Sgd (Illegible)
(ISMAIL BIN AHMAD)
No. K/P. 2332239

Tandatangan Saksi : ...
Sgd (Illegible)
(ALI BIN SAHARAB)
Ketua Kampong,
Teriang Kechil,
Endau, Johore.

By 30 April 1992, the defendant had refunded the deposit of RM2,300 and this meant that the agreement for the sale of the land had been terminated. That agreement came to an end. The defendant was entitled to avoid the contract.

There was no provision in the agreement for the plaintiff to appeal against the decision of the state authority for the rejection of the transfer of the land to her. The plaintiff took it unto herself, acting unilaterally, and wrote a letter of appeal to the Menteri Besar of Johor in an undated letter marked as exh. P3, which was worded in this manner:

- a** Daripada,
Puan Nor Azlina bt. Abdul Aziz,
Kampung Triang Besar,
86900 Endau,
Johor
- b** -----
- Kepada,
Yang Amat Berhormat Menteri Besar
Negeri Johor,
Pejabat Menteri Besar Negeri Johor,
c Johor Bahru,
Johor Darul Takzim.
- Yang Amat Berhormat,
- d** PER: RAYUAN TERHADAP PENOLAKAN KEBENARAN PINDAHMILIK
H.S.(M) 110, LOT 332
MUKIM PENYABONG
PENJUAL/PEMILIK ASAL: AMINAH BT. OMAR
@ MINAH BT. OMAR
PEMBELI : NOR AZLINA BT. ABDUL AZIZ
- e** -----
- Saya merujuk kepada permohonan Penjual untuk mendapatkan kebenaran pindahmilik harta tersebut di atas yang telah di tolak oleh Pejabat Tanah dan Galian Johor.
- f** Disini saya lampirkan satu (1) salinan surat penolakan tersebut yang bertarikh 5hb. Disember, 1991 untuk rujukan Yang Amat Berhormat.
- Dengan segala hormatnya saya merayu kepada Yang Amat Berhormat terhadap penolakkan permohonan kebenaran pindahmilik tersebut:
- g** i) Tujuan saya untuk mendapatkan pindah milik tanah tersebut daripada penjual yang merupakan saudara kepada saya adalah kerana beliau sekarang berada di dalam keuzuran untuk mengusahakan tanah tersebut.
- ii) Saya juga ingin memaklumkan kepada Yang Amat Berhormat bahawa penyerahan tersebut adalah berdasarkan tali persaudaraan memandangkan saya yang merupakan bakal penerima masih lagi belum mempunyai tanah
- h** sendiri.
- Sesungguhnya saya amat berharap agar Pihak Yang Amat Berhormat dapat memberikan pertimbangan yang sewajarnya terhadap rayuan saya.
- i**

Di atas perhatian dan pertimbangan Yang Amat Berhormat, saya dahului dengan ucapan terima kasih.

a

Yang benar,

Sgd (Illegible)

...

Nor Azlina bt. Abdul Aziz

b

The letter of appeal (P3) enclosed the letter of rejection as per exh. P2 and that letter of appeal (P3) was not even copied to the defendant. The letter of appeal (P3) was sent by way of a cover letter from Messrs Onn Hussein & Yee dated April 2, 1993 and marked as exh. P15. For convenience exh. P15 is now reproduced in full:

c

ONN HUSSEIN & YEE
PEGUAMBELA & PEGUAMCARA
ADVOCATES & SOLICITORS

d

Wan Sulaiman Wan Ngah
Zubir bin Embong
Sya Leing Siew
Constance Teo Wai Leng
Daniel Lee Yun Khong
See Swee Sie

e

Kuala Lumpur Office:
Tingkat 5,
Wisma Yakin,
Jalan Melayu,
50100 Kuala Lumpur.
Tel : 2982929(6 lines)
Fax : 2920608

f

Ruj.Tuan/Your Ref:
Ruj.Kami.Our Ref : 22/24/2099/93/NAAA
Tarikh/Date : 2HB. APRIL, 1993

g

Y.A.B. Menteri Besar Negeri Johor,
Pejabat Menteri Besar Negeri Johor,
Johor Bahru,
Johor Darul Takzim.

h

Yang Amat Berhormat,

i

- a** PER: RAYUAN TERHADAP PENOLAKAN KEBENARAN
PINDAHMILIK H.S.(M) 110, LOT 332
PENJUAL/PEMILIK ASAL: AMINAH BTE OMAR
@ MINAH BTE OMAR
PEMBELI : NOR AZLINA BTE ABDUL AZIZ
- b** -----
Kami mewakili Pembeli di atas.

Kami ingin merujuk kepada surat penolakan daripada Pejabat Pengarah Tanah dan Galian Johor yang bertarikh 5hb Disember 1991.
- c** Sehubungan dengan perkara di atas, kami bagi pihak anakguam kami, dengan ini mengemukakan Surat Rayuan daripada anakguam kami bagi menjelaskan kepada Yang Amat Berhormat sebab-sebab pindahmilik patut dibenarkan.

Kami amat berharap agar pihak Yang Amat Berhormat dapat memberikan pertimbangan yang sewajarnya terhadap rayuan klien kami.
- d** Di atas perhatian dan pertimbangan Yang Amat Berhormat ke atas rayuan ini, kami dahului dengan ucapan terima kasih.

Yang benar,

(Sgd (Illegible))
- e** 24/11
s.k. Klien.
- f** It can therefore safely be surmised that the plaintiff appealed to the Menteri Besar of Johore on 2 April 1993 without the knowledge of the defendant. The need for the plaintiff to inform the defendant of that appeal can be fully appreciated bearing in mind that the defendant had refunded the deposit on 30 April 1992. In *Kok Kon Sang v. Siti Zaliha bte Mohd Noor & Anor* [1993] 1 AMR 2: 74, Lim Beng Choon J was faced with an almost similar situation. His Lordship narrated the facts of the case, briefly, in this way as seen at
- g** p. 79 of the report:

Pursuant to cl. 6 of the agreement which provided that,

Upon execution of this agreement the vendor shall apply to the relevant authority for consent to transfer the said property to the purchaser,
- h** the necessary application for the required consent was jointly made by the plaintiff and the defendant on 28 March 1989, to the Selangor State Authority but it was rejected on 30 August 1989. Thereafter the plaintiff on her own motion lodged an appeal with Pegawai Daerah Ulu Langat on 21 September 1989. Apparently the appeal was referred to the Selangor State Authority who
- i** subsequently on 11 July 1990, gave their consent for the transfer of the

disputed property. The letter of approval was addressed to the solicitors of the plaintiff who received it on 26 July 1990 with a copy sent to the plaintiff herself but no copy of the said letter was sent to the defendant.

a

In another part of the same judgment especially at p. 86 of the report, Lim Beng Choon J, had this to say:

b

Turning to the second contention of the applicant namely that in any event the agreement had been nullified by the refusal of the Selangor State Authority to give their consent, I am in full agreement with this proposition. The Privy Council case of *Dalsukh v. Guarantee Life & Employment Insurance Co.* AIR 1947 PC 182 lends support to the said proposition. In the Privy Council case the defendant contracted to sell certain property to the plaintiff. One of the terms of the contract was that the property was to be sold subject to the court's approval. An application was duly made to the court but was rejected. Thereafter the plaintiff sued the defendant for specific performance of the agreement. In confirming that dismissal of the plaintiff's suit was correct Sir Madhavan Nair said at p. 186:

c**d**

... application was made by the vendor to the proper court and was refused; the contract then fell to the ground and had worked itself out. In their Lordships' opinion, the contract was a contingent contract and, as the contingency failed, there was no contract which could be made the basis for a decree for specific performance and the appellant's suit has to be dismissed.

e

In the present case cl. 6 of the agreement casts the obligation on the vendor (that is the applicant) to apply to 'the relevant authority' for consent to transfer the disputed property to the purchaser. This is necessary since the title of the disputed property is endorsed with the following condition:

f

Tanah yang dipajakan ini tidak boleh dipindahmilik atau dipajakan melainkan dengan kebenaran pihak Berkuasa Negeri.

As stated earlier the respondent took upon herself to appeal to the Selangor State Authority to review their decision to refuse consent. The appeal was lodged by the respondent on 21 September 1989. The applicant was completely in the dark as regards to this appeal since a copy of the appeal was not extended to him neither was he notified of the appeal. In lodging the appeal behind the back of the applicant I hold that the respondent was in breach of cl. 6 since that clause casts the obligation on the vendor to apply for the necessary consent. The purchaser has no right to unilaterally lodge an appeal – she should at the very least inform the vendor before lodging the appeal to obtain his concurrence. In considering this issue the following observation of Sir Madhavan Nair made in the *Dalsukh's* case (*supra*) is relevant (see p. 186):

g**h****i**

- a* The question next to be considered is whether the appellant could waive the benefit of the condition and call upon the vendor to perform the contract in spite of the failure of the condition? Their Lordships have already pointed out that the term in question was an essential one intended not exclusively for the benefit of the purchaser, and that it was for the benefit of the vendors also. It follows therefore that the purchaser cannot get rid of the necessity for the approval of the court by his waiver.
- b*

Just like *Kok Kon Sang v. Siti Zaliha bte Mohd Noor & Anor (supra)*, the title to the land in the present case was endorsed with a restriction worded in this fashion:

c

SEKATAN HAKMILIK

Tanah yang dikurniakan ini tidak boleh di jual, di pajak, di gadai, di cagar atau di pindah milik dengan cara menggunakan surat perjanjian yang bertujuan melepas/ menjual tanah ini tanpa kebenaran Penguasa Negeri.

d

and cls. 2, 3 and 5 of the agreement took into account this impediment in the title. Thus, when the state authority rejected the application for transfer on 5 December 1991 the whole agreement collapsed to the ground and became nugatory.

e

The plaintiff lodged an appeal behind the back of the defendant and there was evidence to this effect and found support in para. 7(b) of the statement of defence. By letter dated 29 November 1993, the office of the Director of Lands and Mines, Johor conveyed a message to the defendant with a copy to the plaintiff to the effect that the government had approved the application for the transfer of the land to the plaintiff and that the validity of the approval was valid for six months from the date of that letter. Several more extensions were asked for and allowed. The approval letter was marked as exh. P4 and it was worded thus:

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g

PEJABAT PENGARAH TANAH DAN
GALIAN JOHOR,
PETI SURAT 718,
80000 JOHOR BAHRU.

NO. TEL : 243366/69
FAX : 238464

h

Ruj. Kami: (7) dlm.PTG(D)PM/MG/91-34
Tarikh : 29 November 1993

Puan Aminah bt Omar @ Minah bt Omar,
Kampung Triang Besar,

i

86900 Endau,
Johor.

a

Melalui: Tetuan Onn Hussein & Yee
(Ruj: 22/24/2099/93/NAAA

PERMOHONAN KEBENARAN MEMINDAHMILIK TANAH
HS(M) 110 LOT 332 Mukim Penyabong

b

Adalah di maklumkan bahawa Kerajaan BERSETUJU di atas permohonan tuan/
puan untuk memindahmilik KESELURUHAN/BAHAGIAN tanah tersebut di
atas kepada NOR AZLINA BT ABDUL AZIZ (K/P: 7064598) dengan
dikenakan denda sebanyak RM75.00.

c

Sila tuan jelaskan denda tersebut berserta borang 14A yang telah di penuhi
dan di setemkan dengan sempurna kepada Pejabat Tanah Mersing untuk
tindakan selanjutnya. Surat pejabat ini bil.(2) dalam siri yang sama bertarikh
5.12.1991 dengan ini dibatalkan.

d

Sekian, terima kasih

“BERKHIDMAT UNTUK NEGARA”

Sgd (Illegible)
(JAMA BIN JOHAN)
b/p Pengarah Tanah dan Galian.

e

S.K. - Pentadbir Tanah, Mersing - PTD(MG)10/
PM/126/90.

- Puan Nor Azlina bt Abdul Aziz,
Kg. Triang Besar,
86900 Endau, Johor.

f

NOTA: (i) Surat kebenaran ini hanya boleh digunakan dalam tempoh 6 bulan
sahaja mulai daripada tarikh surat ini dikeluarkan.
(ii) Borang 14A boleh diperolehi di Pejabat Tanah Daerah.

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AHS/noor.

In my judgment, it was unreasonable for the plaintiff to appeal clandestinely
without the knowledge of the defendant. It was unreasonable that the approval
as reflected in P4 which came some 2 years 11 months after the agreement
in P1 should bind the defendant. Very much earlier in the day, to be precise
on 5 December 1991 as reflected in P2, the State Authority had rejected the
application for the transfer of the land.

h

This was not the case of undue influence as the defendant sought to argue.
Section 16(1) of the Contracts Act 1950 enacts that:

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- a** A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.
- b** and the factual matrix of the present case did not show that one side dominated the will of the other. Both parties were negotiating at arms length and neither party twists the arm of the other. Wong Kim Fatt JC in *Letchemy Arumugan v. N. Annamalay* [1982] 2 MLJ 198, 201 said in a brief reference to s. 16(1) of the Contracts Act 1950:
- c** I find as a fact that the plaintiff was induced by undue influence on the part of the defendant to sign the agreement of 7 January 1977 and the three agreements for the purchase of the three sub-lots. Section 16(1) of the Contracts Act 1950 (Revised 1974) defines 'undue influence' and s. 17 defines 'fraud'. (See *Lloyds Bank v. Bundy* [1974] 3 All ER 757, 765, and *Re Craig (Deceased)*, *Meneces v. Middleton* [1970] 2 All ER 390, 393 on undue influence).
- d** The plaintiff sought for specific performance of the agreement dated 30 December 1990 (P1) and in lieu thereof general damages plus interests. The Specific Relief Act 1950 governs the subject matter at hand and by s. 21 thereof the court has a discretion to refuse specific performance where the
- e** granting of it would invariably cause undue hardship to the defendant. To the plaintiff the bargain turned out worse than expected but on the authority of *Venkatachalam Chettiar v. Arunasalam Chettiar* [1953] MLJ 234 and also relying on the case of *Denne v. Light* [1857] 8 DM & G 774; 44 ER 588 that would not constitute hardship. In refusing specific performance of the
- f** present proceedings, I am guided by the words employed in s. 21(1) of the Specific Relief Act 1950 in that "the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal." Under s. 20 of the Specific Relief Act 1950 where damages will provide an adequate remedy, the court will exercise its
- g** discretion not to decree specific performance. This was what happened in *Yeo Long Seng v. Lucky Park (Pte) Limited* [1971] 1 MLJ 20. In *Sekemas Sdn Bhd v. Lian Seng Co. Sdn Bhd* [1989] 2 MLJ 155 SC, Lee Hun Hoe CJ (Borneo) speaking for the then Supreme Court had this to say at p. 157 of the report:
- h** Under s. 21(2)(b) the courts may refuse to grant the relief of specific performance to the plaintiff if the granting of it would involve some hardship on the defendant which he did not foresee. Each case must be decided on its particular facts. In *RM Venkatachalam Chettiar & Ors v. NKR Arunasalam Chettiar* [1953] MLJ 234 Thomson J as he then was, held that no grant
- i**

hardship would be caused to the vendor's representative to complete the transaction even if it would incur some unanticipated expenditure. In *Haji Osman bin Abu Bakar v. Saiyed Noor bin Saiyed Mohamed* [1952] MLJ 37 specific performance was granted. The court rejected the argument that hardship would be caused to the beneficiaries if such an order was granted. The appellant in *Patel & Anor v. Ali & Anor* [1984] 1 All ER 978 was successful in her appeal against an order of specific performance on ground of hardship. There was in that case a period of more than four years' delay and it would be just to leave plaintiffs to their remedy in damages. In *Johnson & Anor v. Agnew* [1979] 1 All ER 883 the House of Lords varied the order of the Court of Appeal holding that if a vendor obtained an order for specific performance and it became impossible to enforce it, he then had the right to ask the court to discharge the order and terminate the contract. On such an application he could be awarded damages at common law for breach of contract since the contract was not rescinded *ab initio* but remained in existence until it was terminated by the court.

Finally, the New Zealand case of *Nicholas v. Ingram* [1958] NZLR 972 where the defence was based solely on financial inability to complete. We refer to the headnotes. In an action for specific performance of a contract for the sale of land, hardship on the part of the defendant may operate as a defence. But the hardship must, in general, be such as existed at the time of the contract and not such as has arisen subsequently from a change of circumstances.

Lee Hun Hoe CJ (Borneo) in *Sekemas* rightly said that "each case must be decided on its particular facts." Here, there was a concluded contract when the parties signed the agreement (P1) but its performance was dependent on the approval of the state authority. Since the latter had rejected the application to transfer the land on 5 December 1991, specific performance can never be granted by this court (*Chin Tai v. Siow Shiow & Ors* [1971] 1 MLJ 67 FC). Ong CJ (Malaya) in delivering the judgment of the then Federal Court in *Chin Tai* took a realistic approach when his Lordship said at p. 69 of the report:

The only impediment to a transfer by way of specific performance as prayed in the counterclaim, is a requirement of the necessary permission. In the circumstances I think the application for such permission may be made by the first defendant, supported by a copy of this judgment as grounds of her application and by virtue of the agreement. In the event of permission being granted and the plaintiff failing after 14 days of notice received to execute a registrable transfer the assistant registrar of this court is to do so in her place and call for surrender of the issue document of title by the plaintiff.

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- a* Should permission, however, be refused, the first defendant should be entitled alternatively to damages – being the amount of the first defendant’s outlay expended in developing the land.

Now, since specific performance cannot be ordered against the defendant – can the plaintiff succeed to obtain damages from the defendant? Ong CJ (Malaya) in *Chin Tai* seemed to say that damages must be measured according to the outlay expended in developing the land. Here, the plaintiff did not, on the evidence, expend a single cent to develop the land. The evidence showed that the defendant had expended money to build chalets on the land. The plaintiff therefore cannot succeed in her alternative claim for damages.

- c* Next, turning to the issue of fraud as set out by the defendant in her statement of defence, I am constrained to say that the defendant in raising this defence was trying to avoid the enforcement of the agreement by specific performance. The court in *Siah v. Tengku Long* [1964] MLJ 43 refused to order specific performance where there was evidence of fraud. The word “fraud” is defined in s. 17 of the Contracts Act 1950 to cover certain acts which are committed with intent to induce another party to enter into a contract. The section enumerates five different acts which may constitute fraud. Sir Richard Couch in the Privy Council case of *Pertab Chundar Ghose v. Mohendra Purkait* (1888-1889) 16 IA 233 observed:
- d*

- e* Where one party induces the other to contract on the faith of representations made to him, any one of which is untrue, the whole contract is, in a Court of Equity, considered as having been obtained fraudulently.

- f* Factually, the defendant was not induced by the plaintiff’s misrepresentation to sign the agreement to sell the land. The defendant, as I said, bargained with the plaintiff about the sale of the land. There was no fraudulent misrepresentation by the plaintiff within the meaning of s. 17(a) and (d) of the Contracts Act 1950. This was not like the case of *Loi Hieng Chiong v. Kon Tek Shin* [1983] 1 MLJ 31 where the then Federal Court agreed with the trial judge that the appellant had not been honest as to the true value of the land when he persuaded the respondent to exchange the lands. The then Federal Court held that the “exchange was not fair, just and reasonable” having regard to the accepted value of the land and, as such, the appellant had “perpetrated fraud in the exchange of the land titles.” In my judgment, the defendant failed to prove fraud beyond reasonable doubt (*Eastern & Oriental Hotel (1951) Sdn Bhd v. Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 SC). This case illustrates the difficulty in proving fraud beyond reasonable doubt. It was certainly easy for the defendant to allege fraud but it was difficult to prove it. Incidentally, the particulars of fraud were not particularised at all
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- h*

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by the defendant. It was merely averred by the defendant in general terms that the plaintiff had committed fraud in transferring the land to her. This was insufficient. The purpose of pleadings is to prevent surprise by limiting the issues for trial. The defendant certainly failed to measure up with the stringent requirements of good pleadings.

This case was decided in favour of the defendant by construing strictly the agreement as reflected in P1. Once the state authority rejected the transfer of the land to the plaintiff on 5 December 1991 the matter ended there. The private caveat entered by the plaintiff on the land cannot afford to protect the plaintiff forever. Of course, initially the private caveat will protect the plaintiff pending registration of the transfer. The private caveat, in law, will prevent the defendant from dealing with the land subsequently to the prejudice of the plaintiff and it may grant the plaintiff priority over any other subsequent third party claimant to the land. In *Butler v. Fairclough* [1917] 23 CLR 78, Griffith CJ observed lucidly that a caveat:

... operates as notice to all the world that the registered proprietor's title is subject to the equitable interest alleged in the caveat.

Lord Diplock in the classical case of *Eng Mee Yong v. Letchumanan* [1979] 2 MLJ 212 remarked that:

The system of private caveats is substituted for the equitable doctrine of notice in English land law.

Section 322(2) of the National Land Code 1965 enacts that the effect of a private caveat is to prohibit the registration or entry on the register document of title of any dealing in land. The prohibitory effect of a private caveat would be to prevent registration by third party claimant so long as the caveat remains on the register and in force. Having decided this case in favour of the defendant, the private caveat should be removed forthwith from the register and it was so ordered accordingly. It was also my judgment and I so ordered that the plaintiff's claim be dismissed with costs.

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